Wong Siew Choong Sdn Bhd v Anvest Corp Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-17 OF 1998

CHONG SIEW FAI CJ (SABAH & SARAWAK), ABU MANSOR AND ABDUL MALEK AHMAD JJCA

1 JULY 1999

***Contract** — Formation — Concluded contract — Sale and purchase of land — Agent contracting on behalf of undisclosed principal to purchase land — Whether binding and enforceable contract between principal and vendor — Whether breach of Valuers, Appraisers and Estate Agents Rules 1986 r 93(2) would affect formation and validity of contract*

The respondent, Anvest Corp Sdn Bhd ('Anvest') had contracted with Appraisal (M) Sdn Bhd ('the estate agent') to purchase a piece of land on certain conditions and had requested that Anvest's identity be kept confidential. The estate agent, through various correspondence, purportedly confirmed the sale of a piece of land, belonging to the appellant, to an undisclosed principal. There were some disputes between the parties, resulting in the respondent claiming for specific performance of the contract of sale contended by the respondent to be binding on the parties. The trial judge found as a fact that the respondent was not the purchaser of the land and there was not privity of contract at any time between the parties, and dismissed the respondent's claim. The respondent appealed. The Court of Appeal reversed the decision of the learned trial judge and directed the case to be remitted to the High Court for proper order to be made as to the completion of the contract (see [1998] 2 MLJ 30). The appellant appealed.

Held, dismissing the appeal with costs:

(1) There was no reason why the Court of Appeal could not rely on the correspondences and give credence to them in testing the oral evidence of the respondent's witnesses, more particularly the evidence of PW1 and PW4. Testing their oral testimonies against the relevant documentary evidence in this case, the evidence of PW1 was more reliable and ought to have been accepted in preference to that of PW4. The court agrees that a binding and enforceable contract had been concluded between the parties by 14 October 1988 vide the correspondences (see pp 580I, 581B).

(2) Rule 93(2) of the Valuers, Appraisers and Estate Agents Rules 1986 relates to the professional conduct of an estate agent, a breach thereof would render it liable to punishment. On the facts and the circumstances of this case, the court agrees with the Court of Appeal that the breach would not affect the formation and validity of the contract (see p 581D–E).

[Bahasa Malaysia summary

Penentang, Anvest Corp Sdn Bhd ('Anvest') telah mengikat kontrak dengan Appraisal (M) Sdn Bhd ('ejen harta tanah tersebut') untuk membeli sekeping tanah atas syarat-syarat tertentu dan telah meminta agar pengenalan Anvest dirahsiakan. Ejen harta tanah tersebut, melalui pelbagai surat menyurat, telah mengesahkan penjualan sekeping tanah, kepunyaan perayu, kepada seorang prinsipal yang tidak didedahkan. Wujud beberapa pertelingkahan antara pihak-pihak tersebut, mengakibatkan penentang menuntut pelaksanaan spesifik kepada kontrak jualan yang ditegaskan oleh penentang sebagai mengikat ke atas pihak-pihak tersebut. Hakim perbicaraan mendapati bahawa adalah suatu kenyataan bahawa penentang bukan merupakan pembeli tanah tersebut dan tidak ada privity kontrak pada bila-bila masa antara pihak-pihak tersebut, dan menolak tuntutan penentang. Penentang telah membuat rayuan. Mahkamah Rayuan mengakaskan keputusan hakim perbicaraan yang bijaksana dan mengarahkan kes ini diremitkan ke Mahkamah Tinggi untuk perintah yang betul dibuat terhadap penyelesaian kontrak tersebut (lihat [1998] 2 MLJ 30). Perayu telah membuat rayuan.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Tidak ada sebab kenapa Mahkamah Rayuan tidak boleh bergantung kepada surat menyurat tersebut dan membuktikan kebenaran mereka di dalam menguji keterangan secara lisan saksi-saksi penentang, terutama sekali keterangan SP1 dan SP4. Dengan menguji testimoni-testimoni mereka terhadap keterangan dokumentar di dalam kes ini, keterangan SP1 lebih boleh dipercayai dan sepatutnya diterima daripada SP4. Mahkamah bersetuju bahawa suatu kontrak yang mengikat dan boleh dikuatkuasakan telah dipersetujui antara pihak-pihak tersebut pada 14 Oktober 1988 dengan melihat kepada surat-menyurat tersebut (lihat ms 580I, 581B).

(2) Peraturan 93(2) kepada Peraturan Penilai, Penaksir dan Ejen Harta Tanah adalah berhubung dengan kelakuan profesional seorang ejen harta tanah, pelanggaran yang mana akan menyebabkannya boleh dikenakan hukuman. Berdasarkan keterangan-keterangan dan keadaan-keadaan di dalam kes ini, mahkamah bersetuju dengan Mahkamah Rayuan bahawa pelanggaran tersebut tidak akan menjejaskan pembentukan dan kesahan kontrak tersebut (lihat ms 581D–E).]

Notes

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2152–2212.

Legislation referred to

Valuers, Appraisers and Estate Agents Rules 1986 r 93(2)

Appeal from: Civil Appeal No W–02–351 of 1995 (Court of Appeal, Kuala Lumpur)

Cyrus Das (*Harcharan Singh* with him) (*Harcharan & Co*) for the appellant.

Wong Kim Fatt (*Gan Huey Piin* and *Tan Siew Siew* with him) (*Gulam & Wong*) for the respondents.

Chong Siew Fai CJ (Sabah & Sarawak) (delivering judgment of the court): The postponement on 11 June 1999 enabled us to deliberate more closely the submissions of counsel for both sides in the light of the evidence adduced in this case.

Respecting the correspondence attacked by counsel for the appellant, they were classified as follows:

(a) Appeal Record (AR) 300C, AR 300D and AR 300E which counsel impugned both as to their makings and their contents, and

(b) AR 251, AR 275 and AR 277 respecting which formal proof was dispensed with but their contents were called in question.

AR 300C was a letter dated 3 October 1988 purported to be from the respondent, Anvest Corp Sdn Bhd ('Anvest') to Appraisal (M) Sdn Bhd ('the estate agent') agreeing to purchase the land in question on certain conditions and requesting to keep Anvest's identity confidential.

Both AR 300D and 300E dated 4 October 1988 and 5 October 1988 respectively were purported to be from the estate agent to Miss Kheoh And Yeng (PW2) of Anvest. In AR 300D, the estate agent informed Miss Kheoh, inter alia, that they (the estate agent), as instructed, had forwarded RM1,000 to the 'landowner' and did not reveal the purchaser's identity, while in AR 300E, the estate agent, inter alia, pointed out the 'landowner's' amendment of nine months to six months for payment of the balance of the purchase price and requested Miss Kheoh to confirm acceptance of the terms and conditions of sale as contained in letter dated 4 October 1988 (AR 254).

AR 251 was a letter dated 17 August 1988 from Anvest to the estate agent indicating Anvest's intention to purchase a property and agreeing to pay agency fee.

AR 275 was a letter dated 22 November 1988 from M/s Yusuf Lee Pathma & Marbeck (acting for Anvest) to M/s Raja Eleena Siew Ang & Tan (acting for Zodiac Development Sdn Bhd) in which the phrase 'your agreement to assign' was used and which also indicated that any negotiation had to be subject to Anvest 'obtaining the appropriate court order for specific performance against the seller.'

AR 277 was a letter dated 30 November 1988 from M/s Raja Eleena Siew Ang & Tan (acting for Zodiac Development Sdn Bhd) to M/s Yusuf Lee Pathma & Marbeck (acting for Anvest) in which there was mention,

inter alia, that Zodiac 'are still interested in the property and are willing to enter into fresh negotiations with your clients for the purchase of the same from your clients only after your clients have purchased the above property from the vendor'.

As to the attack on the making and the contents of letters AR 300C, AR 300D and AR 300E:

(a) AR 300C and the contents therein, were proved by PW1 Tan Loy Fatt (estate agent's managing director) and by PW2 Kheoh And Yeng (Anvest's director) in AR 99 A-B, 104 C-D, 122 E-F and 133A.

(b) The making and contents of AR 300D were proved by PW1 Tan Loy Fatt in AR 99 B-C and substantiated by PW2 Kheoh And Yeng in AR 123 A-B.

(c) Likewise, the making and the contents of AR 300E were proved by PW1 Tan Loy Fatt in AR 99 E-F and by PW2 Kheoh And Yeng in AR 123D-F.

As regards the correspondences AR 251, 275 and 277, formal proof of their making was dispensed with except that their truth or veracity was disputed:

(a) the contents of the letter AR 251 were proved by PW2 Miss Kheoh in AR 121 E-F and substantiated by PW1 Tan in AR 97F.

(b) Letter AR 275 was in reply to AR 273 and AR 274 (see PW3 Lee Lim Huat's evidence in AR p 141C). The contents of AR 275 were proved by PW3 Lee Lim Huat (Anvest' solicitor) in AR 141 A-B. As regards the contradiction in AR 275 suggested before us by counsel for the appellant, this was not specifically so raised at the trial in the High Court. It is therefore not surprising that there was no explanation from PW3. But PW3's evidence is clear that the intended assignment was to be from Anvest to Zodiac (see AR 140 C-D, 159E to 160A (under re-examination)).

(c) As to the letter AR 277 (Zodiac's admission of taking assignment from Anvest), PW3 Lee Lim Huat (Anvest's solicitor) testified that that was the reply to his letter AR 275 (AR 141D).

It is to be noted that apart from calling DW1, the Registrar of the Board of Valuers Appraisers and Estate Agents whose testimony bore no relevance to any of the issues relating to the six letters dealt with above, the appellant/defendant did not call any other witness at the trial to prove or support any of the contentions raised before us.

In the cross-examination of the respondent's/plaintiff's witnesses, only certain aspects of some of the contents in some of the correspondences were raised. More importantly, the learned trial judge had made no finding that any of the correspondences called in question before us was or were false or unreliable.

In the circumstances, we see no reason why the Court of Appeal could not rely on the correspondences and give credence to them in testing the oral evidence of the respondent's/plaintiff's witnesses, more particularly the evidence of PW1 and PW4.

A As stated by both the Court of Appeal and the High Court, the sole issue was the identity of the purchaser relating to the three correspondences: AR 253, 254 and 256.

There can be no dispute that PW1 Tan Loy Fatt's evidence and PW4 Foo Fang Lim's evidence at the trial are conflicting in material respects. B Testing their oral testimonies against the relevant documentary evidence in this case, we agree with the Court of Appeal that the evidence of PW1 was more reliable and ought to have been accepted in preference to that of PW4. We further agree that a binding and enforceable contract had been concluded between the parties by 14 October 1988 vide correspondences AR 253, 254 and 256.

C As regards the contention of 'hawking', on the basis, which we accept, that a contract had been concluded between the appellant and the respondent herein on 14 October 1988 and on the relevant evidence adduced, we agree that there had been no 'hawking'. In particular, we find that Zodiac Development Sdn Bhd came into the picture after 14 October 1988 and was purported to be an assignee of the respondent.

D On the question of breach of r 93(2) of the Valuers, Appraisers and Estate Agents Rules 1986 by the estate agent, we agree that r 93(2) relates to the professional conduct of an estate agent, a breach thereof would render it liable to punishment. On the facts and the circumstances of this case, we agree with the Court of Appeal that the breach would not affect the E formation and validity of the contract.

We have read the judgments of the learned trial judge and of the Court of Appeal as well as perused the relevant oral and documentary evidence adduced in this case. In our view, the Court of Appeal was justified and was right in reversing the decision of the learned trial judge and directing the F case to be remitted to the High Court for proper order to be made as to the completion of the contract.

We are unanimous that this appeal should be dismissed. This appeal is dismissed with costs to the respondent, such costs be taxed, if not agreed. Decision of the Court of Appeal is affirmed. Deposit to account of costs.

G *Appeal dismissed with costs.*

Reported by Loo Lai Mee

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